No. 3544

United States
Circuit Court of Appeals
For the Ninth Circuit.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

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F. D. MONCKTON,
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Juneau, Alaska,
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United States

Circuit Court of Appeals

For the Ninth Circuit.

Cause No. 3544.

AL WEATHERS,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error.

STATEMENT OF CASE.

On the 9th day of September, 1919, the defendant, Al Weathers, together with Ike Weathers and Ernest Stage, was indicted by the United States Grand Jury at Juneau, Alaska. The indictment (pp. 1–6, Transcript) was in three counts, for alleged violation of the provisions of sections 1897 and 1898, Compiled Laws of Alaska, 1913. The trial of the defendant began on the —— day of February, 1920, and on the 18th day of February, 1920, the jury returned a verdict of guilty, under counts 2 and 3 of the indictment and not guilty, under count 1, with a recommendation for clemency of the Court on account of defendant's youth (pp. 371, 372, Transcript).

On the 20th day of February, 1920, defendant filed his motion for a new trial (pp. 372, 373, Transcript),

which motion was denied by the Court on the 1st day of March, 1920 (p. 373, Transcript). On the 6th day of March, 1920, judgment was entered on the verdict and the defendant sentenced to four years in the United States Penitentiary, at McNeil Island (pp. 375, 376, Transcript). On the 15th day of April, 1920, petition for writ of error was allowed (pp. 377, 378, Transcript), and on the 16th day of April, an order allowing the writ of error and fixing the bond in the amount of Six Thousand ($6,000.00) Dollars, (pp. 378, 379, Transcript). On the 15th day of April, 1920, defendant filed his assignment of errors (pp. 379–397, Transcript), as follows:

ASSIGNMENT OF ERRORS.

Comes now Al. Weathers, defendant below and plaintiff in error in this action, in connection with his petition for a writ of error, and makes the following assignment of errors which he avers occurred upon the trial of this cause, to wit:

1.

The Court erred in admitting the evidence of the witness Alfred Knutsen, who testified to seeing the gas-boat "Diana" on the 10th day of July, 1919, being two days after the crime alleged to have been committed by the defendant herein was committed, and particularly to that portion of the evidence of said Alfred Knutsen, as follows:

"Q. What was your purpose in wanting to hail it?

"A. I recognized that was the same boys [boat] that was shooting at us before.

Mr. HUBBARD.—I don't believe that testimony is admissible. He is asking what his purpose was in hailing the boat on the 10th and it is incompetent and irrelevant so far as the issues in this indictment are concerned.

Mr. SMISER.—No, it is not, in my judgment.

Mr. HUBBARD.—It might come in later on in rebuttal but at this time it is not admissible.

The COURT.—I do not see how it can possibly injure anybody—it is only an explanation of what he was doing himself, and it does not connect the defendant in any way as yet. I think he may testify what his purpose was, and if the defendant is not connected with it in any way it will be stricken.

Q. What was your purpose in hailing her, Captain?

A. The purpose was, I recognized her to be the same boat.

Mr. HUBBARD.—I thought the Court ruled that he could not answer the question as to his purpose.

The COURT.—The objection is overruled—he may testify what his purpose was.

Mr. HUBBARD.—Exception.

Q. Did you know what the name of the boat was at this time? A. I didn't see the name on her; no.

Q. You didn't know at that time and you wanted to find out what the name of it was, was that it?

A. Yes, I wanted to see the name of it.

Q. You wanted to see the name of it and that is the reason you hailed [318] it, as you recognized it as the boat that did the shooting and you wanted to see the name of the boat, is that it?

Mr. HUBBARD.—I object to that—the witness has not stated that.

The COURT.—No, he did not say that—do not lead the witness.

Q. (By Mr. SMIZER.) The question was what was your purpose in hailing the boat and going up close to it,—what did you do that for?

A. I wanted to get up close and see the name of it.

Q. Why did you want to see the name of that boat?

A. I recognized it to be the same boat that was up there the 8th.

Q. That shot at you? A. The 8th.

Q. Now, what did you do in order to hail it?

A. I changed my course.

Q. Well, what did you do with your scow?

A. I dropped the scow—left the scow—dropped the scow. . . .

Q. Now, when you approached the boat what did it do?

A. Well, after they run a little while they turned right around.

Mr. HUBBARD.—If the Court please, I think he has now stated what his purpose was, and what he accomplished. Now, he is testifying to what the boat did.

The COURT.—That is the very object of the testimony, to find out what the boat did—not what he did. The very object of this testimony is to show what the boat that he recognized as being the boat that fired the shots did.

Mr. HUBBARD.—We wish to object to any testimony as to what it did as being incompetent, irrele-

vant and immaterial in this case at this time, what the boat did. The purpose, we understood, was that he wanted to identify the boat.

The COURT.—The objection is overruled.

Mr. HUBBARD.—The defendant saves an exception to the ruling of the Court. To the introduction of which the defendant objected which objection was overruled by the Court and an exception was allowed."

2.

The Court erred in admitting the testimony of the witness W. A. Borland, who testified to seeing the boat "Diana" several days after the occurrence for which the defendant was on trial in this Court, and that he saw the defendant upon the said day on the said gas-boat at a place some twenty miles distant from the scene where the offense is alleged to have been committed, and particularly to that portion of said testimony being as follows:

"(By Mr. SMISER.)

Q. Please state your name.

A. W. A. Borland.

Q. Where do you live? A. Hoonah.

Q. What is your business? A. Physician.

Q. Do you practice medicine at Hoonah?

A. Yes, sir.

Q. Do you occupy any office there?

A. Yes, sir; commissioner.

Q. United States Commissioner? A. Yes, sir.

Q. Where were you on the 10th day of July, 1919?

A. Well, I left the cannery on a boat bound for Admiralty Island.

Q. What boat?

A. The 'Forrester.' [319]

Q. Who was captain of the boat?

A. Knutsen.

Q. In making the trip I will ask you whether you encountered another boat or saw another boat?

A. Yes, sir.

Q. I will ask you what you did with reference to that boat after seeing it.

Mr. HUBBARD.—We will reserve an exception to this testimony as not being competent. It in no way tends to prove any of the allegations in the three counts of the indictment here—it is not relevant.

The COURT.—The objection will be overruled provided the defendant is connected with it.

Mr. HUBBARD.—This witness does not claim to have been at Admiralty Cove at the time of the original transaction at all, which has been testified to by the other witnesses.

The COURT.—The defendant would not have to be connected by this witness.

Mr. HUBBARD.—I reserve an exception to the testimony of the witness on this question.

A. One of the men came and reported to the Captain,—

Mr. HUBBARD.—I object to that, if the Court please.

Q. (By Mr. SMISER.) Just tell what was done.

A. They changed their course and followed the boat.

Q. About how far off would say the boat was at that time—at the time they changed their course and followed?

A. Two and one-half or three miles—something like that.

Q. How long did they continue to follow it?

A. Well, I think it was over an hour, perhaps something like that.

Q. Did the 'Forrester' boat have anything with it at that time? A. Had a scow.

Q. What was done with reference to the scow?

A. Well, after they had followed the boat a considerable time, they were not making very much headway, and Captain Knutson dropped the scow.

Q. Then what did they do?

A. As soon as the scow was dropped, we had probably gone a few hundred yards when the boat that we were following turned and came back across the bow of the 'Forrester.'

Q. Came back across the bow of the 'Forrester.'

A. Yes.

Q. Now, describe what transpired between the two boats from there on.

A. Captain Knutson stopped the 'Forrester,' and the boat we were following turned across the bow and then stopped, and the men came out and covered up the name on the bow.

Q. What boat are you speaking of?

A. The 'Diana.'

Q. Is that the boat you had sighted?

A. That we were following? Yes, sir.

Q. Go ahead—the men came out and did what?

A. They dropped a canvas over the name on the boat—or covered—I don't know whether it was canvas or not, and came out and placed up something against the gunwale of the boat—a square, I should judge, 2½ or 3 feet square, and a man came out of the pilot-house with a gun, and one went up the forecastle and the other was on the back of the pilot-house.

Q. How many men did you see?

A. I saw two at the time on the 'Diana.'

Q. I will ask you if anything was said by the men on the 'Diana' at that time?

A. Yes, they hollered, 'Come on, you square heads.'

[320]

Q. Hollered, 'Come on, you square heads'?

A. Yes, sir.

Q. Was that at the time you saw the man with the gun? A. Just about that.

Q. Now, when Captain Knutson saw that what did he do?

A. Got scared, become frightened, turned the boat around, said 'They are going to shoot,' and started away.

Q. Now, I will ask you if you know the defendant, Al Weathers? A. Yes, sir.

Q. I will ask you if you recognized the men on the boat at that time?

A. He was the only man I recognized, yes, sir.

Q. You recognized him? A. Yes, sir.

Q. Yes,—well, he was the man who came out of the pilot-house with the gun; at the time he came

out I didn't recognize him as being Al Weathers, but he was the tall one.

Q. Now, do you know Al Weathers' voice?

A. Well, yes, I do.

Q. I will ask you whether or not at that time you recognized his voice?

A. I thought I did at the time, yes, sir."

To the introduction of which the defendant objected, which objection was by the Court overruled and an exception allowed.

3.

The Court erred in admitting the testimony of the witness Iver Stenzo, and particularly that portion of the testimony of the said witness referring to matters occurring prior to the time upon which the offense alleged in the indictment herein was committed, and particularly that portion of the testimony of the said witness reading and being as follows:

"Q. I will ask you whether you were at Admiralty Cove about the middle of June.

A. Yes, I was there.

Q. I will ask you whether or not any trap was robbed at that time?

A. Yes, there was.

Q. What trap?

A. The Bay trap and the floating-trap No. 4. [321]

Q. Do you know whether they had fish in them at that time?

A. Yes, they had a few.

Q. Do you know how many?

A. About 200, I think, in the Bay trap.

Mr. HUBBARD.—If the Court please, we desire to save an exception to this testimony with reference to the 16th, that he is testifying to.

The COURT.—The testimony is admitted, Mr. Smiser, on your promise to connect it—if it is not connected it will be stricken.

Mr. SMISER.—I think we will do that satisfactorily, your Honor.

The COURT.—Very well. It will be admitted, subject to a motion to strike later on if counsel thinks it is not connected.

Q. About how many fish were in No. 4 at that time?

A. I don't know.

Q. What boat—did you recognize the boat?

A. Yes, it seemed to be the same boat.

Q. What boat was that?

A. The 'Diana.'

Q. I will ask you if you were there on June 10th?

A. Yes, I was.

Q. I will ask you if any trap was robbed on that occasion?

A. Yes; no, I was robbed.

Q. What time did that occur?

A. I don't know; it was in the night-time.

Mr. HUBBARD.—We reserve our exception to this testimony, the same as the others, if the Court please—we do not think it is material or competent in this case.

The COURT.—The ruling will be the same.

Q. Did you see that boat on that occasion?

A. No.

Q. All you know about this particular instance is that the trap was robbed on this particular date?

A. Yes.

Mr. HUBBARD.—Now, if the Court please, we will move to strike out his testimony—he said he didn't see the boat.

The COURT.—The District Attorney does not have to connect it with this witness. When the Government's testimony is closed if it is not connected then is the time to make your motion to strike out. He does not have to connect it by this one witness—he may have some other witness to connect it by—I cannot tell.

Mr. HUBBARD.—We will keep our exception until later.

4.

The Court erred in admitting the testimony of the witness John Hanson in which said witness testified to having seen the boat "Diana" on other occasions and at various times, other than the time when the offense alleged in the indictment was committed, and particularly that portion of said witness' testimony which is as follows:

"Q. I will ask you if anything occurred on the night of the 30th of June there at your trap?

A. Yes.

Q. What occurred? [322]

Mr. HUBBARD.—The evidence is not admissible. It is a transaction that occurred on the 30th day of June at a point a long distance from where the transaction took place which we are trying. It is not in any way connected with the case which is on trial, and there is nothing that connects it up in any way with that transaction. The evidence is inadmissi-

ble—it is incompetent, irrelevant and immaterial as to this case, and has a tendency to prejudice the minds of the jury.

The COURT.—I think, Mr. Smiser, that I indicated what my ruling is on these matters. If you can connect this boat with any similar offense—holding up traps—it would be evidence of intent and purpose, but if this witness' testimony is not any more connecting than the last witness' testimony—

Mr. SMISER.—Well, it is.

The COURT.—I would have sustained an objection to the last witness' testimony—I would have stricken it out if the motion had been made because that witness could not identify the boat and did not identify any men that were on it. Unless this witness can identify the boat, or identify the men, or connect it in some other way, the objection will be well taken.

Mr. SMISER.—I think it will be fully identified, your Honor.

The COURT.—Very well, I will admit it subject to a motion to strike it when the testimony is finished.

Mr. HUBBARD.—We understand that as far as the testimony of the last witness is concerned it is subject to your Honor's ruling that if it isn't connected the motion to strike will be sustained. It might still be connected by other witnesses—it is true that the last witness did not identify it—it might be connected by some other witness, but if it is not we propose when the Government has its case in to make our motion. . . .

Q. Go ahead and tell what happened.

A. Well, I came something about halfway and I heard the noise of a bullet some place near by me.

Mr. HUBBARD.—If the Court please, it seems to me that before the witness testifies to any more detail he should be asked whether he recognized that boat or recognized the parties on it.

Mr. SMISER.—I will ask that at the proper time.

The COURT.—I have indicated what the ruling will be—if it is not connected it will be stricken.

Mr. HUBBARD.—If the Court please, the witness has testified that he saw a boat. Now, he knows whether or not he recognized that boat, and if he knows that boat, or if he saw any of the parties there he can testify that he recognized them. If he did the testimony might go in, but to put in a lot of detail here of something that transpired before it is identified to the jury—

The COURT.—If he does not identify the boat it does not hurt you in any way whatsoever. How can it hurt you?

Mr. HUBBARD.—I do not know that it would, if the Court please.

The COURT.—If he does not know anything about what boat it was, or cannot identify the boat or the parties on it, it does not hurt you; consequently let counsel develop his case the way he wants to, then if it is not connected it will be stricken out. I cannot direct him as to what order he shall put his testimony in. [323]

Mr. HUBBARD.—I am inclined to think, if your Honor please, that testimony of this kind does have

a tendency to hurt, even if it is afterward stricken out. We will save an exception to the testimony.

The COURT.—Proceed. . . .

Q. (By Mr. SMISER.) Now, I will ask you if you saw that boat that they tied up to that trap at that time—did you see the boat?

A. I saw the boat; yes.

Q. Do you know what boat that was?

A. No, not at that time.

Q. Well, did you afterwards in any way find out what it was?

A. Well, they took us into town here and we found a boat by the dock down here on Front Street that seemed to be like it.

Q. I will ask you whether or not you recognized it as the same boat?

Mr. HUBBARD.—Now, if the Court please, I think I will object to the testimony. The witness has stated that he did not recognize the boat at that time.

The COURT.—I know, Mr. Hubbard, but you might see a thing at one time and then see it at another time and know it was the same thing.

Mr. HUBBARD.—He might come to the conclusion that the boat he saw several weeks later was the same boat, but his testimony is being admitted on the ground that he identified the boat.

The COURT.—He does not have to identify it at that time.

Mr. HUBBARD.—We will save an exception to the testimony on that ground, if the Court please, and on the further ground that the boat at the time

it was recognized as he said it was in the hands of the United States Marshal and had been illegally seized by the United States Marshal.

The COURT.—What effect would that have?

Mr. HUBBARD.—I simply want to save an exception.

The COURT.—Very well.

Q. (By Mr. SMISER.) I will ask you whether or not you recognized it as the same boat, speaking at the time you came into Juneau here and saw the boat 'Diana'—I ask you if you recognized it as the same boat that was out at your trap on the 30th of June?

A. I would say it looks like that boat.

Q. Now, at the time you saw the boat at Juneau were there any other boats around except that, or was that the only one there?

A. Around our trap?

Q. No; was there any other boat, when you went to look at the boat at Juneau, the boat that you said looked like the one that was at your trap, were there any other boats around the dock at that time, or only the boat you were looking at?

A. No, I couldn't see any other looks like that boat—that was the nearest I could see around there.

Q. Were there any other boats that did not look like it?

Mr. HUBBARD.—Let me understand—he said, 'Yes, it looked the nearest like that of any,' he saw.

Mr. SMISER.—Suppose he did say it—what of it.

Mr. HUBBARD.—I want to understand what he said.

The COURT.—Yes, that is what he said.

Q. Now, were there any other boats there when you were looking at it to find out what boat it was—were there any other boats around there? [324]

A. Yes, there was—there was many boats around there. . . .

Mr. HUBBARD.—Now, if the Court please, I will move at this point to strike out the testimony of the witness on the ground that he has not identified the boat.

The COURT.—I think, Mr. Smiser, if that is as far as this witness can go, that it looked nearer like it than any other boat he saw, that it is not sufficiently connected.

Q. (By Mr. SMISER.) Please make it as plain as you can whether this in your opinion was the same boat that was at your trap on the 30th of June.

Mr. HUBBARD.—If the Court please, I think I will object to that—the witness has testified.

The COURT.—Overruled.

A. I say it looks like it, the nearest I could see of all them boat around—the shape of the boat and the mast, and it looked almost the same.

Q. Can you state whether in your opinion it was the same boat or not?

Mr. HUBBARD.—Now, if the Court please, I will object to that question. The witness has stated that it looked like it, and it was the nearest of any boat there like it.

The WITNESS.—I couldn't swear to it it was the same boat.

Mr. HUBBARD.—Now, he is asking him to give an opinion about it and he has stated the facts.

The COURT.—The last part of your objection is well taken, first part is not. He cannot give his opinion—he can give his judgment. Now, I will ask this question—I know that you cannot swear positively that it was the same boat, but please state whether or not in your judgment it was the same boat.

A. It was—yes, it was, in my judgment.

Mr. HUBBARD.—We save an exception to that. The witness has stated that he could not swear to it, and it isn't now a question of his judgment and it isn't a question of his opinion.

The COURT.—Well, I am rather inclined to think that is well taken. He has testified that it looks like the boat but he couldn't swear to it. Now, that can go to the jury for what it is worth.

Q. Now, I will ask you, Mr. Hanson, whether you could tell at the time you heard these shots being fired from what direction they were coming?

A. Well, they came from the trap so far as we could judge it.

Q. It came from the trap?

A. From the trap, yes.

Q. Was that the trap where the boat was?

A. Yes, sir.

Mr. HUBBARD.—If the Court please, I do not like to keep interrupting all the time, but I object to it because it is immaterial. He has said he could not identify the boat.

The COURT.—He has identified it in a way, and I said it can go to the jury for what it is worth. I shall instruct the jury what all this evidence is ad-

mitted for—I can cover it by my instructions, I think. The objection is overruled." [325]

5.

The Court erred in overruling the motion of defendant to strike out the testimony of the witnesses John Hanson and Homer Lee given in plaintiff's case in chief, for the reason that the evidence of said witnesses failed to in any way connect the defendant with the commission of any offense, which motion being by the Court denied, was duly excepted to and an exception allowed.

6.

The Court erred in overruling defendant's motion to strike all the testimony given by the witness, Dr. W. A. Borland, relating to matters and things occurring long after the commission of the offenses set up in the indictment, which motion, being by the Court denied, was duly excepted to and an exception allowed.

7.

The Court erred in overruling defendant's motion to strike all that portion of the testimony given by the witness, Alfred Knutson, referring to incidents happening on the 10th day of July, 1919, and long after the commission of the offenses set up in the indictment herein, which motion, being by the Court denied, was duly excepted to and an exception allowed.

8.

The Court erred in overruling defendant's motion to strike all the testimony given on behalf of plaintiff referring to matters and things and offenses

committed on other days than the 8th day of July, 1919, that being the time definitely fixed by the witnesses for the plaintiff when the offenses set up in the indictment herein were committed, which motion was denied by the Court, to which ruling the defendant excepted and an exception was allowed.

9.

The Court erred in overruling defendant's motion for new trial, to which ruling the defendant excepted and an exception was allowed. [326]

10.

The Court erred in pronouncing sentence and judgment against the defendant.

WHEREFORE the defendant below and plaintiff in error prays that the judgment of the District Court may be reversed.

O. P. HUBBARD,
HENRY RODEN,
Defendant's Attorneys.

Service of copy of within assignment of errors is hereby admitted this —— day of April, 1920.

JAMES A. SMISER,
U. S. Attorney.

Filed in the District Court, District of Alaska, First Division. April 15th, 1920. J. W. Bell, Clerk. By ————, Deputy. [327]

Defendant further assigns as error in this case the failure of the Government to prove the allegation of the indictment that the alleged crime of assault with intent to commit robbery was committed within the District of Alaska, and within the jurisdiction of the District Court, and second, the failure of the Govern-

ment to prove that the Hoonah Packing Company is a corporation duly organized and existing as such as alleged in said indictment, in counts 2 and 3 of said indictment.

On the 16th day of February, 1920, the Government having closed its case, and Mr. Smiser, the United States District Attorney, having stated to the Court, "We rest" (p. 287, Transcript), the defendant filed his written motion to strike the testimony of certain witnesses, as follows:

"In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 1346–B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AL WEATHERS,

Defendant.

Motion to Strike.

Comes the defendant and respectfully moves the Court to strike from the record herein the testimony of the following named witnesses, to wit:

The testimony of John Hanson and Homer Lee for the reason that neither of said two witnesses identified either the boat 'Diana' or the defendant at any time testified to by them or either of them.

All the testimony of Dr. Boarland for the reason that said testimony has no bearing upon any of the issues in this case; the same refers to incidents

occurring on the 10th day of July, 1919, long after the commission of the offense for which the defendant is now on trial, and does not tend to establish the commission thereof.

That portion of the testimony of Alfred Knutson referring to incidents happening on the 10th day of July, 1919, for the reason that said testimony concerns incidents long after the commission of the offense for which defendant is being tried, and such testimony does not tend to establish the commission of the offense charged in the indictment.

The testimony of Carl Peterson for the reason that said testimony has no probative force, and does not identify either the defendant or the boat 'Diana.'

All the testimony given on behalf of the plaintiff with reference to the commission of offenses other than on the 8th day of July, for which latter offense the defendant is now on trial, for the reason that all such evidence and testimony is incompetent and irrelevant and does not tend to establish any of the constitutive elements of the offense charged; that there is no causal or logical or natural connection between the act for which the defendant is now being tried and the acts testified to by said witnesses and attempted to be established by such evidence; that the admission of such evidence compels the defendant to meet charges of which the indictment gives him no notice or information; that it raises a variety of issues and tends to confuse and to divert the attention of the jury from the charge upon which the defendant is being tried and the

same does not tend to establish any element of the offense charged.

O. P. HUBBARD,
HENRY RODEN,
Attorneys for Defendant.

Filed in the District Court, District of Alaska, First Division. Feb. 16, 1920. J. W. Bell, Clerk. By John T. Reed, Deputy."

The above and foregoing motion appears at page 287, Transcript.

STATEMENT OF CASE.

The indictment, counts 2 and 3, charge an offense committed under section 1898, Compiled Laws of Alaska, 1913, as follows:

> "That whoever assaults another with intent to kill or to commit rape or robbery upon the person so assaulted, shall be imprisoned in the penitentiary not more than fifteen years or less than one year."

The indictment charges that the crime was committed on the 8th day of July, 1919, at Admiralty Cove, within the District of Alaska, and within the jurisdiction of the court.

The evidence of the Government developed the following situation:

That on the morning of 8th of July, 1919, at about 5 o'clock, a small boat was seen proceeding in a southerly direction on Chatam Strait, of which Admiralty Cove is an indentation of the coast. The said boat was passing along outside of certain fish-traps, designated in the testimony as Admiralty Trap, No. 1, Bay Trap, and Floating Trap,

No. 4. Evidence is also given as to a trap called the Hawk Inlet Trap. The boat, it is testified to by several of the Government witnesses, slowed down as it passed the trap designated as Floating Trap, No. 4. One witness testified that it made a turn there. The boat then proceeded around a point of land to the southward in the direction of Hawk Inlet. Two of the Government witnesses, Swan Swanson and Henry Alexander, testified that they saw the boat as it passed on its course toward Hawk Inlet, that immediately thereafter they got their rifles and their ammunition and took a position near the lead of Floating Trap, No. 4, that they were in this position when a small boat, the witnesses claiming that it was the same boat, that had passed before, again appeared from the Hawk Inlet point of land on a course that would take it near to where a cannery tender belonging to the Hoonah Packing Company was tied to a dolphin.

These two Government witnesses testified that shots were fired from the small boat which was approaching prior to the time that it reached a point outside of the Floating Trap and at a time when the boat was about one thousand feet (1,000) from the trap. They testified to having heard the shots but did not testify to having seen anyone on the small boat doing any firing. They simply testify that shots were heard as they say coming from the small boat.

Henry Alexander testified that he could see where the shots were striking and that it was on the water near the "Forrester."

The two witnesses, Henry Alexander and Swan Swanson, testified that, at this time, they began firing at the small boat from their position on the shore where they were concealed either behind rocks or trees. They testified to firing about forty shots at the small boat. This was the beginning of the trouble on the morning of the 8th of July, at Admiralty Cove. It is apparent from the evidence that shooting had occurred from the shore as well as from the small boat prior to the time when Alfred Knutson, the party upon whom the assault is said to have been made, came upon the scene as he testifies, and that when he heard shooting, he got up. He was sleeping in a stateroom on the "Forrester"—a cannery tender belonging to the Hoonah Packing Company—when he heard the shooting; he testifies he got up, that he looked out through the window of the pilot-house and saw a small boat out beyond the Bay Trap; that he went out on deck and that afterwards shots were fired which he testifies passed across the "Forrester," and one of which he says came very near to him; in fact, he fixes it as four inches from his head and says it knocked him down, and that he fell on the deck.

Another witness, Sofus Ellison, testifies that he was in the pilot-house, having been called up by Knutson, and that he, too, heard shots which passed over the boat, and he further testifies that one shot struck in the mast of the "Forrester"; that he afterwards picked up the bullet which dropped on the deck.

Other witnesses who were on shore—trap watchmen—testify that they were called out after the shooting began and concealed themselves behind a barricade or log protection in front of their cabin. These witnesses testify that the small boat from which they say shots were fired was the "Diana."

There is no evidence by any witness for the Government that the defendant Al Weathers was on the boat which the Government witnesses say they identified as the "Diana" at the time of the alleged shooting.

There is no testimony on the part of the Government that any attempt was made to take fish either from the scow or from either one of the traps. On the contrary, the testimony is that the small boat after having passed down to a point directly in front of the Bay Trap turned out to sea and soon disappeared.

The evidence of the Government witnesses establishes the fact that when the shooting took place, beyond the Floating Trap, No. 4, the small boat was at least four thousand five hundred feet from the "Forrester"; that the nearest the small boat approached to the "Forrester" was three thousand to four thousand feet, although Captain Knutson testifies in his direct testimony that he thought the distance was about two thousand feet, but admitted on cross-examination that he had stated on a former examination that it was three to four thousand feet, and that he probably remembered more accurately at that time, as it was nearer to the occurrence.

This was the situation on the morning of the 8th of July, as disclosed by the witnesses of the Government. On the facts as so disclosed and stated an indictment was returned against the defendant charging him in the first count with maliciously shooting at Alfred Knutson with the intent to kill, wound or maim the said Knutsen, and in the second count with having assaulted Alfred Knutsen by shooting at him with the intention to rob the said Knutson of certain fish, then and there in the fish-traps heretofore described, and in the third count, the defendant was charged with having assaulted Alfred Knutson by shooting at him with a rifle with the intention of taking, stealing and carrying away certain fish from the scow in the possession of the said Knutson.

The Government witnesses testify that there were fish in the scow; they do not testify that there were any fish in the traps on the morning of the 8th of July. The defendant was acquitted by the jury on the charge in the first count.

The scow referred to in the indictment and testified to by the Government witnesses, was lying alongside of the tender, between the tender and a small boat said to have been firing the shots, and it was testified by the witnesses that the scow was a little shorter than the tender itself, but somewhat higher than the tender, out of the water, except that part of the tender described as the pilot-house. The pilot-house was probably a few feet higher than the scow. The testimony of the Government witnesses is that on the tender, at the time

of the alleged assault, there were thirteen men. Of these Alfred Knutson and Sofus Ellison alone testify in this case. No explanation is given by the Government for not calling the other witnesses to this most important part of the alleged crime.

After the facts as stated above were testified to by the Government witnesses Alfred Knutson, Sofus Ellison, Swan Swanson, Henry Alexander, Andrew Abrahamson and Herman Mitts, as to the occurrence on the 8th of July, the Government introduced testimony from the same witnesses, not including Knutson and Ellison, as to alleged trap-lifting on the 5th of July, on the 29th of June, and on the 17th of June. The same witnesses testify that on these several occasions they had recognized the boat "Diana" as being the boat committing the alleged depredations.

One witness Henry Alexander, testified that on one occasion he recognized a voice which he said was that of the defendant.

Alfred Knutson and Dr. W. A. Boarland testify to a transaction which occurred in Icy Strait. This was on the 10th of July. The witnesses testify that they were coming from the Hoonah cannery and were on their way to Admiralty Cove, on the cannery tender "Forrester," and that they saw a small boat out on the strait three or four miles from them and passing on an opposite course.

The witnesses testify that they gave chase to this boat and pursued it for more than an hour in an attempt to overtake it.

Dr. Boarland testifies that they were all armed, but does not testify that they intended to make an attack upon the small boat. He does state, however, that the captain became scared and turned about. It would seem from his testimony that they had some purpose that was not well intended or friendly to the small boat.

At this time there were thirteen men on the cannery tender, "Forrester," and again we have only two witnesses testifying to the occurrence, Alfred Knutson, and the captain and Dr. Boarland, both closely associated with the Hoonah Packing Company and in its employ.

The Government then introduced in evidence and was permitted by the Court to introduce in evidence the testimony of John Hanson, Homer Lee, J. H. Ferguson and Ted Likeness, as to other offenses alleged to have been committed on the 30th of June, and on the night of the 7th or morning of the 8th of July. These occurrences were testified to by the witnesses to have taken place at points as from twenty to sixty miles from Admiralty Cove.

It was to the admission of the testimony of these witnesses, and the other Government witnesses to transactions or occurrences or alleged offenses at other times and places not charged in the indictment, that the plaintiff objected and that plaintiff contends was prejudicial error on the part of the Court to admit said testimony.

The Government failed to establish by evidence that the crime charged was within the District of Alaska, or within the jurisdiction of the Court.

It also failed to establish by the evidence that the Hoonah Packing Company is a corporation.

The defendant proved by unimpeached testimony that he was not at Admiralty Cove on the morning of the 8th of July or on the morning of the 5th of July.

ARGUMENT.

The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort is irrelevant and inadmissible. The foregoing statement of the general rule is taken from 16 Corpus Juris, section 1132, K., p. 586. In connection with the above statement of the general rule the authorities are cited. The rule extends to proof of an accusation of another crime as well as to evidence of its actual commission.

In a note under the above section, it is said:

> "This is but the reiteration of a still more general rule, that in all cases, civil or criminal, the evidence must be confined to the point in issue."
>
> People vs. King, 276 Ill. 138, 145, 114 N. E. 601.

In another note under the same section, it is stated:

> "The rule is founded in reason. The defendant comes to the trial, prepared to meet only the crime with which he is accused, and he cannot from the nature of things, be pre-

pared to defend against other crimes that may be charged against him. Moreover, it is not the policy of the law to convict a man of one crime by showing that he has, at some time, been guilty of another."

State vs. Eder, 36 Wash. 482, 484, 78 P. 1023.

"The rule therefore rests upon two grounds: first, the impropriety of inferring from the commission of one crime that the defendant is guilty of another, and, second, the Constitutional objection to compelling a defendant to meet charges of which the indictment gives no information."

State vs. Hyde, 234 Mo. 200, 225, 136 S. W. 316.

In the same note it is stated, that:

"Where positive evidence has been introduced by the state, evidence of extraneous and contemporary crimes is not admissible."

Gardner vs. State, 55 Tex. Cr. 400, 117 S. W. 148.

The same authority at section 1133, p. 587, in referring to the exceptions to the rule, states:

"The admission of evidence which shows or tends to show the commission of other offenses by accused has been and should be carefully restricted."

Effler vs. State, 27 Del. 62, 85 Atl. 731.

"While there are several well-recognized exceptions to the rule excluding evidence of other offenses, and these exceptions are

> founded on as much wisdom and justice as the rule itself, the rule should be strictly enforced, and should not be departed from except under conditions which clearly justify such a departure."

In Coble vs. State, 31 Ohio, 100, it is decided that on the trial of an indictment for assault with intent to rob, evidence tending simply to show an attack of like character, committed by the defendant upon another person and at another time and place, is inadmissible. The facts stated in the case cited are somewhat like the facts in the case under consideration and the authorities seem to be directly in point.

In State vs. Spray (Mo. 74 S. W. 846), which was a trial for robbery, it is held, as in the Ohio case, that the evidence of another offense of the same character is not admissible. It is stated in the Missouri case that the testimony of a separate offense must have some tendency to prove the charge in the indictment. It is admissible only on the ground that it has some logical connection with the offense proposed to be proven. It is further stated in State vs. Spray, that "The general rule as to the admission of testimony of the commission of offenses other than the one charged is that it is inadmissible. The rule is very tersely stated by Mr. Bishop in his new criminal procedure. He says: 'The state cannot prove against a defendant any crime not alleged, either as foundation for a separate punishment, or as aiding the

proofs that he is guilty of the one charge, even though he has put his character in issue.' "

In the same case the following language is found: "From the instruction of the Court given in this case, it appears this testimony was admitted for the purpose of showing intent. This was error. The facts constituting the offense and the very act itself, as shown by the prosecuting witness, were sufficient evidence of the intent. The act of defendant, if he committed it, needed no explanation to indicate intent. The act itself carried the intent with it. . . . Upon the trial of a person charged with assault to rob, it is not competent for the state, in aid of the prosecution to prove other assaults committed by the defendant, whether with or without intent—citing Coble vs. State, 31 Ohio State."

In support of the general rule and of the contention of the defendant in this case that the testimony of Dr. W. A. Boarland, John Hanson, Homer Lee, Arvid Johnson, Ted Likeness, J. H. Ferguson, and such portions of the testimony of Alfred Knutson, Ivar Stenso, Swan Swanson, Andrew Abrahamson, and Henry Alexander, as did not pertain to the occurrence on the morning of the 8th of July, was improperly admitted and is prejudicial error in the case, we cite the following cases:

Coble vs. State, 31 Ohio State, p. 100.

State vs. Spray, 74 S. W. 846.

State vs. Hyde, 234 Mo. 200, 225, 136 S. W. 316.

State vs. Lapage, 57 N. H. 245, 24 A. 69.

People v. Minney, 155 Mich. 534, 119 N. W. 918.

People v. Molineux, 168 N. Y. 264, 62 L. R. A. 193.

People v. Grutz, 212 N. Y. 72, 105 N. E. 843.

Ruling Case Law, p. 198, sec. 194.

Ruling Case Law, p. 206, secs. 200, 201.

If, as contended by the plaintiff in error, the admission of the testimony of the witnesses above named was prejudicial, we understand it to be the rule that the reviewing court may presume that such error was prejudicial, unless the record shows the contrary.

Armour & Company vs. Russell, 144 Fed. 614.

We respectfully submit that the case should be reversed and sent back for retrial, on the grounds and reasons set forth in the foregoing brief.

Respectfully submitted,

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